

# STATE OF INDIANA



INDIANA UTILITY REGULATORY COMMISSION  
302 W. WASHINGTON STREET, SUITE E-306  
INDIANAPOLIS, INDIANA 46204-2764

<http://www.state.in.us/iurc/>  
Office: (317) 232-2701  
Facsimile: (317) 232-6758

**IN THE MATTER OF THE INDIANA UTILITY  
REGULATORY COMMISSION'S  
INVESTIGATION OF MATTERS RELATED TO  
THE FEDERAL COMMUNICATIONS  
COMMISSION'S REPORT AND ORDER AND  
ORDER ON REMAND AND FURTHER NOTICE  
OF PROPOSED RULEMAKING IN CC DOCKET  
NOS. 01-338, 96-98, AND 98-147**

**CAUSE NOS. 42500,  
42500-S1, 42500-S2**

**FILED**

**FEB 16 2004**

INDIANA UTILITY  
REGULATORY COMMISSION

You are hereby notified that on this date the Presiding Officers make the following Entry in these Causes:

On February 4, 2004, WorldCom, Inc. d/b/a MCI ("MCI") filed with the Indiana Utility Regulatory Commission ("Commission") its *Motion for Protection of Confidential and Proprietary Information* ("Motion"). The Motion, pursuant to Ind. Code 8-1-2-29, 5-14-3-4, 24-2-3-1, and 170 IAC 1-1.1-4, seeks confidential treatment of certain trade secret information to be submitted to the Commission in these Causes. The trade secret information that is the subject of MCI's request is either MCI's own information, information provided to MCI by other parties to these Causes, or information provided to MCI by non-parties. The trade secret information that MCI contemplates submitting to the Commission, which MCI has received from other parties and non-parties, is subject to private non-disclosure agreements between MCI and those parties or non-parties.

The Motion states that these proceedings are unprecedented due to the time constraints imposed by the Federal Communications Commission, the extensive involvement by both other parties and numerous non-parties, and the necessity that large amounts of trade secret information be submitted to the Commission for complex decision-making purposes. As a result, the Motion asserts that it would be a drain on MCI's and the Commission's resources for MCI to be required to file a separate confidentiality request for each of its numerous, anticipated filings, and for the Commission to then have to rule separately on each request. The Motion cites nine (9) different dates on which prefiled testimony, which presumably would include confidential testimony, is due to be filed in these Causes.

Commission rule 170 IAC 1-1.1-4 requires both an application (request) for confidentiality and a sworn statement in support of the application:

(b) The application required by subsection (a) shall be accompanied by the sworn statement or testimony of a party that describes the following:

- (1) The nature of the confidential information.
  - (2) The reasons why the information should be treated as confidential information pursuant to IC 8-1-2-29 and IC 5-14-3.
  - (3) The efforts the party has made to maintain the confidentiality of the information.
- 170 IAC 1-1.1-4(b)

Accompanying the Motion is the *Affidavit of Joan Campion* ("Affidavit"). This sworn statement describes the type or nature of the information for which confidential treatment is sought:

1. Switching facilities and locations
2. Collocation arrangements and locations
3. Switch utilization and switch capacity
4. High-capacity loop and transport facilities
5. High-capacity loop and transport utilization and capacity
6. End-user customer locations
7. Customer count
8. Current and future business and marketing plans
9. Customer counts and churn
10. Product pricing
11. Profit margins
12. The cost study and supporting work paper information submitted by SBC Indiana in Cause No. 42500-S1, as well as any rerun versions of those cost studies, as modified by any party, including work papers supporting those reruns.

The Presiding Officers agree, for the reasons stated by MCI, that these Causes are unique in comparison to most Commission proceedings. As a result, it is reasonable to give consideration to allowing efficient filing of numerous amounts of confidential information, at the numerous procedural milestones that have been established in these time-constrained Causes, without jeopardizing the purposes or procedures of either the Access to Public Records Act (Ind. Code 5-14-3) or the Commission's rules.

### **Discussion and Findings as to MCI's Own Information.**

The Affidavit states that the information MCI plans to submit to the Commission that fits within the above descriptions is entitled to confidential treatment as records containing trade secrets. Pursuant to Ind. Code 5-14-3-4(a)(4), records containing trade secrets are not subject to public disclosure by a public agency. Ind. Code 5-14-3-2 defines "trade secret" by referencing the definition found in Indiana's Uniform Trade Secret Act which, at Ind. Code 24-2-3-2, states:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other

persons who can obtain economic value from its disclosure or use; and  
(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Affidavit asserts that public disclosure of these records would reveal the specifics of MCI's competitive attempts to enter Indiana's telecommunications market and would give competitors insight into MCI's business plans by revealing areas in which MCI is focusing or reducing new investment. The Affidavit further states that public disclosure of the information for which confidential treatment is sought would give competitors insight into, and would allow conclusions to be drawn from, how MCI serves its customer, its plans for introducing new products, its business trends, growth rates, market penetration rates, and competitive strategies. As a result, the Affidavit asserts, competitors could use this information to develop their own investment and market strategies in response to MCI's resource strengths and weaknesses.

The Affidavit also provides information regarding the efforts MCI has made to keep confidential the records for which it seeks trade secret protection. The Affidavit states that only MCI employees whose job responsibilities require them to have access to the information are allowed access; that employees are required to sign a confidentiality agreement as a condition of employment; and that the importance of maintaining confidentiality of corporate information is internalized in the company's Policies and Procedures Handbook.

MCI's Motion and Affidavit are in compliance with the requirements of 170 IAC 1-1.1-4, except that the Motion and Affidavit are not presented for the purpose of identifying the nature of any particular confidential information that MCI plans to submit in relation to any particular filing event, which, in the Presiding Officer's opinion, is contemplated under 170 IAC 1-1.1-4. MCI is asking for a determination that any document submitted at any time as confidential in these Causes, which fits the types of information described above, will not be subject to public disclosure. And MCI actually goes a step further by broadly extending the nature of the confidential information to "other such competitively-sensitive, confidential, proprietary and trade secret information."

MCI has specifically described the nature of the various types of information it intends to submit as confidential at some point in these proceedings, has stated reasons why the information should be treated as confidential pursuant to Ind. Code 8-1-2-29 and Ind. Code 5-14-3, and has described efforts made to maintain the confidentiality of the information. Even though MCI has not identified the nature of any particular confidential information that it contemplates submitting in relation to any particular filing event, the uniqueness of these proceedings makes it appropriate to streamline the Commission's confidentiality procedures to allow preliminary approval of confidential treatment of records that fit the specific descriptions given by MCI. These specific descriptions of information, in the context of all the information contained in the Affidavit, seem to fit the definition of trade secret.

This streamlining restricts the type of information that can be submitted as confidential to the types of information listed above. Thus, MCI's request to extend the nature of the information that can be submitted to include "other such competitively-sensitive, confidential, proprietary and trade secret information" is rejected. In the context of the Access to Public Records Act, which promotes disclosure of public records, the key to allowing this streamlined procedure is to limit the submission of any information claimed as confidential to that which fits the specific descriptions that have already been determined by the Commission's Presiding Officers to be appropriate for a preliminary determination of confidentiality. Any more extensive or "blanket" approval to treat as confidential, information submitted as confidential, would, at least conceptually, put MCI and not the Commission in the position of determining which public records merit confidential treatment.

This streamlined procedure will permit MCI, pursuant to this preliminary determination of confidentiality, to submit to the Commission, as confidential, documents containing information that fits the above descriptions without having to file a separate application and sworn statement for each confidential submission. In addition, MCI will not have to wait for a separate ruling on separate applications and sworn statements before submitting the information claimed to be confidential. Any information that falls outside of the specific descriptions given above, that MCI desires to submit as confidential, will necessarily require a separate application and sworn statement.

#### **Discussion and Findings as to Other Parties' and Non-Parties' Information.**

As to information that MCI anticipates submitting to the Commission that was obtained as confidential from other parties or non-parties, the Affidavit asserts that this information falls into the same categories that MCI has used to describe its own confidential information. The Affidavit states that MCI, through communications with these other parties and non-parties, has determined that the party or non-party with whom the information originated considers the information to be trade secret and protected from public disclosure under Indiana law. Unlike the factual statements in the Affidavit concerning MCI's own information, these conclusory statements do not factually address why the information should be treated as confidential or what efforts have been made to maintain the confidentiality of the information. While the fact that MCI and the other parties and non-parties have entered into non-disclosure agreements establishes one very immediate effort at maintaining confidentiality, there still is lacking a sufficient factual basis, unique to the owner of the information, to which the definitional elements of "trade secret" can be fully applied. And while we could assume that any other telephone company would provide the same basic sworn statement as MCI to establish trade secret protection, such an assumption might not only be incorrect, but would be contrary to the purposes of the Access to Public Records Act and could result in the Commission being unable to meet its burden of proof for denying a public records request for the information of other parties or non-parties that was submitted by MCI.

To the extent that other party or non-party information has already been preliminarily determined to be confidential, it is reasonable that the confidentiality

determination should continue when the same information, even if in a different format, is submitted by MCI or any other party. It is likewise reasonable that the determination of confidentiality in regard to SBC's cost study should continue to its resubmission by MCI or any other party, even if the inputs have been manipulated by MCI or another party.

Responses submitted to the November 3, 2003 Docket Entry/electronic questionnaire have already been preliminarily determined to be confidential if the submitter of the responses sought confidential treatment by simply requesting, or marking, the responses as confidential. Any party's submission to the Commission of another party's or non-party's questionnaire responses, which the original submitter claimed as confidential, should likewise be treated as confidential.

With the exception of that portion of the cost study record or related cost and pricing information which contains only the proposed costs that translate into the final rates and charges that SBC Indiana recommends the Commission adopt, a preliminary determination of confidentiality has already been made regarding SBC Indiana's submission of cost study information and supporting work papers in Cause No. 42500-S1. Another party's submission of that same information should likewise be treated as confidential, as should any information generated by any party in rerunning SBC's confidential cost study with modified inputs.

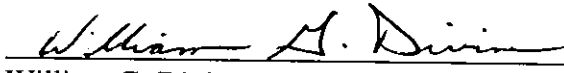
If MCI anticipates submitting claimed confidential information from other parties or non-parties that is not already subject to a confidentiality determination, MCI should submit a sworn statement that provides a factual basis, specific to the owner of the information, that satisfies the requirements of 170 IAC 1-1.1-4(b). Given, again, the unique circumstances of these particular proceedings, if such information is to be submitted at more than one filing milestone, the type of affidavit approved above for MCI's own information, which describes specific types or categories of confidential information to be submitted, would likewise be acceptable for other party and non-party information.

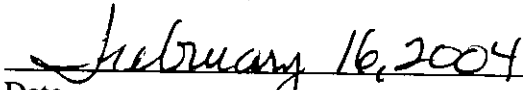
Documents to be submitted to the Commission that are subject to the preliminary confidentiality determinations made in this Entry should be hand-delivered to the Presiding Administrative Law Judge in a sealed envelope that is clearly marked confidential and with the applicable Cause Number or Cause Numbers noted thereon. Said documents shall be handled and maintained as confidential in accordance with Ind. Code 5-14-3.


Other parties to these proceedings desiring a preliminary determination of confidentiality as to types or categories of information to be filed at some point in these proceedings should follow the same procedural steps as MCI, which are found at 170 IAC 1-1.1-4.

IT IS SO ORDERED.

  
Judith G. Ripley, Commissioner

  
William G. Divine, Administrative Law Judge

  
Date

  
Nancy E. Manley, Secretary to the Commission